

REMARKS

1. In response to the Office Action mailed June 11, 2009, Applicants respectfully request reconsideration. Claims 139-176 were last presented for examination. In the outstanding Office Action, claims 139-176 were rejected. By the foregoing Amendments, claims 139, 140, 144-147, 253, 255-260, 262, 164-169, 171 and 173-176 have been amended, claims 141-143, 151, 152, 154, 163 and 172 have been cancelled and claims 177-180 have been added. Thus, upon entry of this paper, claims 139, 140, 144-150, 153, 155-162, 164-171 and 173-180 will be pending in this application. Of these thirty-four (34) claims, 4 claims (claims 139, 156, 165, and 174) are independent.

2. Based upon the above Amendments and following Remarks, Applicants respectfully request that all outstanding objections and rejections be reconsidered, and that they be withdrawn.

Art of Record

3. Applicants acknowledge receipt of form PTO-892 listing references identified by the Examiner.

Claim Rejections under §102 Givens

4. The Examiner rejects claims 139-144, 147-152, 154-156, 159-165 and 168-174 under 35 U.S.C. 102(e) as being anticipated by U.S. Patent No. 6,916,291 to Givens et al., (hereinafter, "Givens"). Applicants respectfully request that the Examiner reconsider and withdrawn these rejections.

Claim 139

5. Givens is directed to a system for performing diagnostic hearing tests over a computer network. (*See*, Givens, col. 2, lns. 18- 56.) The system allows interactions between a test administration site and one or a plurality of remote patient sites. (*See*, Givens, col. 2, lns. 18- 56.) In Givens, "the hearing test can be performed such that the hearing tones (frequency and decibel level) are generated locally to the patient in response to commands selecting the desired

tone/level which are transmitted from the expert or test administration site.” (*See*, Givens, col. 2, lns. 18- 56.) The “patient’s response to each of the hearing tones (output locally) can be transmitted to the remote administration site where it can be considered and evaluated. Thus, the clinician can adjust testing parameters based on the patient’s response.” (*See*, Givens, col. 2, lns. 18- 56.) The clinician can “(a) select or adjust the tone transmitted to the patient; (b) repeat one or more of the tones or frequencies; and/or (c) render a diagnostic evaluation.” (*See*, Givens, col. 2, lns. 18- 56.) In other words, Givens is directed to a system that allows a clinician to remotely perform a series of tests that assess a patient’s level of hearing loss. The clinician continually adjusts the tones etc. delivered to the patient during the tests to obtain an accurate assessment of the hearing loss.

6. Applicants’ claim 139 is directed to a “system for performing after-care of a recipient of a cochlear implant.” (*See*, Applicants’ claim 139, above; emphasis added.) The “clinician subsystem [is]... configured to receive one or more clinician inputs that at least one of select or customize one or more cochlear implant after-care tests.” (*See*, Applicants’ claim 139, above; emphasis added.) The “recipient subsystem [is] configured to receive the one or more after-care tests, and... perform the one or more after-care tests selected or customized on the clinician subsystem.” (*See*, Applicants’ claim 139, above; emphasis added.)

7. Applicants respectfully remind the Examiner that “[a] claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference.” (*See*, MPEP §2131.01, quoting *Verdegaal Bros. v. Union Oil Co. of California*, 814 F.2d 628, 631 (Fed. Cir. 1987).) The MPEP makes it clear that for a *prima facie* rejection under 35 U.S.C. §102, “[t]he identical invention must be shown in as complete detail as is contained in the... claim.” (*See*, MPEP §2131.01, quoting *Richardson v. Suzuki Motor Co.*, 868 F.2d 1226, 1236 (Fed. Cir. 1989); emphasis added.) Applicants assert that the rejection of claim 139 fails to satisfy these legal obligations. As noted above, Givens is exclusively directed to a system for evaluating a patient’s hearing loss, and merely provides tones to the patient. Not only is the testing of Givens not equivalent to “after-care of a recipient of a cochlear implant,” but the system of Givens also completely fails to disclose any type of system that is configured to receive inputs “that at least one of select or customize one or more after-care tests” as recited, in part, in claim 139. It would be appreciated that the adjustment of

tones is not equivalent to the selection or customization of “one or more [cochlear implant] after-care tests.”

8. Furthermore, Givens fails to disclose “[t]he identical invention... in as complete detail as is contained” in claim 139 because Givens fails to disclose any system which is configured to “receive the one or more after-care tests, and... perform the one or more after-care tests selected or customized on the clinician subsystem.” (See, Givens, col. 2, lns. 18- 56.) As noted, the system of Givens merely includes a patient terminal which provides tones to the patient. Givens lacks any disclosure indicating that the terminal is capable of performing cochlear implant “after-care tests” as recited, in part, in claim 139.

9. Therefore, because Givens does not disclose the system of claim 139 in “as complete detail as contained in the claim,” Applicants assert that Givens fails to anticipate the invention of claim 139. As such, Applicants respectfully request that the rejection of claim 139 under 35 U.S.C. §102(e) be reconsidered, and that it be withdrawn.

Claim 156

10. Applicants’ claim 156 is directed to a “method for performing after-care of a recipient of a cochlear implant.” (See, Applicants’ claim 156, above; emphasis added.) The method comprises “receiving one or more inputs... that at least one of select and customize one or more cochlear implant after-care tests ... delivering said... tests to a recipient subsystem... [and] performing, on the cochlear implant, said one or more after-care tests selected or customized one the clinician subsystem.” (See, Applicants’ claim 156, above.) For at least the reasons discussed above with reference to claim 139, Applicants respectfully assert that Givens fails to disclose at least these elements of claim 156.

Claim 165

11. Applicants’ claim 165 is directed to a “computer readable medium comprising computer code instructions which, when executed by a computer system implement a method of performing after-care of a recipient of a cochlear implant.” (See, Applicants’ claim 165, above; emphasis added.) The method comprises “receiving one or more inputs... that at least one of select or customize one or more cochlear implant after-care tests ... delivering said... tests to a

recipient subsystem... [and] performing, on the cochlear implant, said one or more after-care tests selected or customized on the clinician subsystem.” (See, Applicants’ claim 165, above.) For at least the reasons discussed above with reference to claim 139, Applicants respectfully assert that Givens fails to disclose at least these elements of claim 165.

Claim 174

12. Applicants’ claim 174 is directed to a “system for performing after-care of a recipient of a cochlear implant.” (See, Applicants’ claim 174, above; emphasis added.) The system comprises “means for receiving one or more inputs... at least one of selecting and customizing one or more cochlear implant after-care tests ... means for delivering said... tests to a recipient subsystem... [and] means for performing, on the cochlear implant, said one or more after-care tests selected or customized on the clinician subsystem.” (See, Applicants’ claim 174, above.) For at least the reasons discussed above with reference to claim 139, Applicants respectfully assert that Givens fails to disclose at least these elements of claim 174.

Claim Rejections under §103 Givens in view of Faltys

13. The Examiner also rejects claims 145, 146, 153, 157, 158, 166, 167, 175, and 176 under 35 U.S.C. 103(a) as being unpatentable over Givens in view of U.S. Patent No. 5,626,629 to Faltys et al., (hereinafter, “Faltys”). Without addressing the apparent lack of motivation to combine the cited references, Applicants assert that these rejections are improper because neither Givens nor Faltys, taken alone or in combination, inherently or expressly discloses all elements of the claimed invention.

Claim 139

14. Faltys is directed to a system for programming a speech processor for use with an implantable cochlear stimulator. (See, Faltys, col. 1, lns. 6-17.) In Faltys, the speech processor and implantable cochlear stimulator are fit to a particular patient by “programming the speech processor with a threshold stimulation level and a comfortable stimulation level, by programming an input dynamic range, and by programming a gain level.” (See, Faltys, col. 1, lns. 6-17.) More specifically, a clinician provides a stimulation signal to the patient via a cable

connecting the fitting system and the patient's speech processor unit. (*See*, Faltys, col. 5, ln. 52- col. 6, ln. 42.) The system records an objective measurement of the patient's response to the stimulation. (*See*, Faltys, col. 6, lns. 32- col. 8, ln. 23.) Based on the objective measurement, the clinician adjusts the stimulation provided. (*See*, Faltys, col. 6, lns. 32- col. 8, ln. 23.) This procedure is iteratively repeated to determine a patient's threshold and comfort levels. (*See*, Faltys, col. 6, lns. 32- col. 8, ln. 23.) The fitting step of Faltys is a required initial step that is performed so that the implantable cochlear stimulator is usable by the patient. (*See*, Faltys, col. 2, lns. 51- col. 3, ln. 26.)

15. Applicants' claim 139 is directed to a "system for performing after-care of a recipient of a cochlear implant." (*See*, Applicants' claim 139, above; emphasis added.) The "clinician subsystem [is]... configured to receive one or more clinician inputs that at least one of select or customize one or more cochlear implant after-care tests." (*See*, Applicants' claim 139, above; emphasis added.) The "recipient subsystem [is] configured to receive the one or more selected or customized after-care tests from the clinician subsystem, and wherein the recipient subsystem communicates with the cochlear implant so as to perform the one or more after-care tests selected or customized on the clinician subsystem." (*See*, Applicants' claim 139, above; emphasis added.)

16. As noted above, Faltys is exclusively directed to a system for initially fitting a cochlear implant to a patient and is used by a clinician to set a patient's threshold and comfort levels, dynamic range, and programming a gain level. (*See*, Faltys, col. 1, lns. 6-17; col. 6, lns. 32- col. 8, ln. 23.) Not only is the testing of Faltys not equivalent to "after-care of a recipient of a cochlear implant," but the system of Faltys also completely fails to disclose any type of system that is configured to receive inputs "that at least one of select or customize one or more after-care tests" as recited, in part, in claim 139.

17. Furthermore, Faltys fails to disclose any system which receives "the one or more selected or customized after-care tests from the clinician subsystem, and wherein the recipient subsystem communicates with the cochlear implant so as to perform the one or more after-care tests selected or customized on the clinician subsystem." (*See*, Faltys, col. 6, lns. 32- col. 8, ln. 23.) As noted, the system of Faltys requires a clinician to operate the tests, evaluate objective

feedback and adjust stimulation signals applied to the patient. (*See*, Faltys, col. 6, lns. 32- col. 8, ln. 23.) Faltys lacks any disclosure indicating that the system of Faltys is capable of providing a performing cochlear implant “after-care tests” as recited, in part, in claim 139.

18. Therefore, because neither Givens nor Faltys, taken alone or in combination, disclose at least these elements of the system of claim 139, Applicants assert that the above rejections of claims 145, 146 and 153 under 35 U.S.C. §103 are improper and should be withdrawn.

Claim 156

19. Applicants’ claim 156 is directed to a “method for performing after-care of a recipient of a cochlear implant.” (*See*, Applicants’ claim 156, above; emphasis added.) The method comprises “receiving one or more inputs... that at least one of select or customize one or more cochlear implant after-care tests ... delivering said... tests to a recipient subsystem... [and] performing, on the cochlear implant, said one or more after-care tests selected or customized one the clinician subsystem.” (*See*, Applicants’ claim 156, above.) For at least the reasons discussed above with reference to claim 139, Applicants respectfully assert that Faltys fails to disclose at least these elements of claim 156. Therefore, because neither Givens nor Faltys, taken alone or in combination, disclose all elements of the system of claim 156, Applicants assert that the above rejections of claims 157 and 158 under 35 U.S.C. §103 are improper and should be withdrawn.

Claim 165

20. Applicants’ claim 165 is directed to a “computer readable medium comprising computer code instructions which, when executed by a computer system implement a method of performing after-care of a recipient of a cochlear implant.” (*See*, Applicants’ claim 165, above; emphasis added.) The method comprises “receiving one or more inputs... at least one of selecting and customizing one or more cochlear implant after-care tests ... delivering said... tests to a recipient subsystem... [and] performing, on the cochlear implant, said one or more after-care tests selected or customized one the clinician subsystem.” (*See*, Applicants’ claim 165, above.) For at least the reasons discussed above with reference to claim 139, Applicants respectfully assert that Faltys fails to disclose at least these elements of claim 165. Therefore,

because neither Givens nor Faltys, taken alone or in combination, disclose all elements of the system of claim 165, Applicants assert that the above rejections of claims 166 and 167 under 35 U.S.C. §103 are improper and should be withdrawn.

Claim 174

21. Applicants' claim 174 is directed to a "system for performing after-care of a recipient of a cochlear implant." (See, Applicants' claim 174, above; emphasis added.) The system comprises "means for receiving one or more inputs... at least one of selecting and customizing one or more cochlear implant after-care tests ... means for delivering said... tests to a recipient subsystem... [and] means for performing, on the cochlear implant, said one or more after-care tests selected or customized one the clinician subsystem." (See, Applicants' claim 174, above.) For at least the reasons discussed above with reference to claim 139, Applicants respectfully assert that Faltys fails to disclose at least these elements of claim 174. Therefore, because neither Givens nor Faltys, taken alone or in combination, disclose all elements of the system of claim 174, Applicants assert that the above rejections of claims 175 and 176 under 35 U.S.C. §103 are improper and should be withdrawn.

Claim Rejections under §103 Faltys in view of Alexandrescu

22. The Examiner also rejects claims 139-176 under 35 U.S.C. 103(a) as being unpatentable over Faltys in view of U.S. Patent No. 5,909,497 to Alexandrescu et al., (hereinafter, "Alexandrescu"). Without addressing the apparent lack of motivation to combine the cited references, Applicants assert that these rejections are improper because neither Faltys nor Alexandrescu, taken alone or in combination, inherently or expressly discloses all elements of the claimed invention.

Claim 139

23. Alexandrescu is directed to an acoustic hearing aid having an interface permitting wireless programming of the signal processor. (See, Alexandrescu, Abstract.) The programming interface wirelessly receives program codes and translates the codes into a programming language usable the signal processor of the acoustic hearing aid. (See, Alexandrescu, col. 3, ln.

59- col. 4, ln. 19.) The programming is then implemented by the signal processor. (*See*, Alexandrescu, col. 3, ln. 59- col. 4, ln. 19.)

24. Applicants' claim 139 is directed to a "system for performing after-care of a recipient of a cochlear implant." (*See*, Applicants' claim 139, above; emphasis added.) The "clinician subsystem [is]... configured to receive one or more clinician inputs that at least one of select and customize one or more cochlear implant after-care tests." (*See*, Applicants' claim 139, above; emphasis added.) The "recipient subsystem [is] configured to receive the one or more selected or customized after-care tests from the clinician subsystem, and wherein the recipient subsystem communicates with the cochlear implant so as to perform the one or more after-care tests selected or customized on the clinician subsystem." (*See*, Applicants' claim 139, above; emphasis added.)

25. As noted above, Alexandrescu is exclusively directed to a system for providing programs to an acoustic hearing aid. (*See*, Alexandrescu, col. 3, ln. 59- col. 4, ln. 19.) Not only is the testing of Alexandrescu not equivalent to "after-care of a recipient of a cochlear implant," but the system of Alexandrescu also completely fails to disclose any type of system that is configured to receive inputs "that at least one of select or customize one or more after-care tests" as recited, in part, in claim 139.

26. Furthermore, Alexandrescu fails to disclose any system which is "configured to receive the one or more selected or customized after-care tests from the clinician subsystem, and wherein the recipient subsystem communicates with the cochlear implant so as to perform the one or more [cochlear-implant] after-care tests selected or customized on the clinician subsystem." ((*See*, Alexandrescu, col. 3, ln. 59- col. 4, ln. 19.) As noted, the system of Alexandrescu merely provides programs to a hearing aid. (*See*, Alexandrescu, col. 3, ln. 59- col. 4, ln. 19.) Alexandrescu lacks any disclosure indicating that the system is capable of providing a patient with the ability to perform cochlear implant "after-care tests" as recited, in part, in claim 139.

27. Therefore, because neither Faltys nor Alexandrescu, taken alone or in combination, disclose at least these elements of the system of claim 139, Applicants assert that the above rejection of claim 139 under 35 U.S.C. §103 is improper and should be withdrawn.

Claim 156

28. Applicants' claim 156 is directed to a "method for performing after-care of a recipient of a cochlear implant." (See, Applicants' claim 156, above; emphasis added.) The method comprises "receiving one or more inputs... that at least one of select or customize one or more cochlear implant after-care tests ... delivering said... tests to a recipient subsystem... [and] performing, on the cochlear implant, said one or more after-care tests selected or customized one the clinician subsystem." (See, Applicants' claim 156, above.) For at least the reasons discussed above with reference to claim 139, Applicants respectfully assert that Alexandrescu fails to disclose at least these elements of claim 156. Therefore, because neither Faltys nor Alexandrescu, taken alone or in combination, disclose all elements of the system of claim 156, Applicants assert that the above rejection of claim 156 under 35 U.S.C. §103 is improper and should be withdrawn.

Claim 165

29. Applicants' claim 165 is directed to a "computer readable medium comprising computer code instructions which, when executed by a computer system implement a method of performing after-care of a recipient of a cochlear implant." (See, Applicants' claim 165, above; emphasis added.) The method comprises "receiving one or more inputs... that at least one of select and customize one or more cochlear implant after-care tests ... delivering said... tests to a recipient subsystem... [and] performing, on the cochlear implant, said one or more after-care tests selected or customized one the clinician subsystem." (See, Applicants' claim 165, above.) For at least the reasons discussed above with reference to claim 139, Applicants respectfully assert that Alexandrescu fails to disclose at least these elements of claim 165. Therefore, because neither Faltys nor Alexandrescu, taken alone or in combination, disclose all elements of the system of claim 165, Applicants assert that the above rejection of claim 165 under 35 U.S.C. §103 is improper and should be withdrawn.

Claim 174

30. Applicants' claim 174 is directed to a "system for performing after-care of a recipient of a cochlear implant." (*See*, Applicants' claim 174, above; emphasis added.) The system comprises "means for receiving one or more inputs... that at least one of select or customize one or more cochlear implant after-care tests ... means for delivering said... tests to a recipient subsystem... [and] means for performing, on the cochlear implant, said one or more after-care tests selected or customized one the clinician subsystem." (*See*, Applicants' claim 174, above.) For at least the reasons discussed above with reference to claim 139, Applicants respectfully assert that Alexandrescu fails to disclose at least these elements of claim 174. Therefore, because neither Faltys nor Alexandrescu, taken alone or in combination, disclose all elements of the system of claim 174, Applicants assert that the above rejection of claim 174 under 35 U.S.C. §103 is improper and should be withdrawn.

Dependent claims

31. The dependent claims incorporate all the subject matter of their respective independent claims and add additional subject matter which makes them independently patentable over the art of record. Accordingly, Applicants respectfully assert that the dependent claims are also allowable over the art of record.

File History

32. In Applicants' prior Response filed March 24, 2009, (hereinafter, "Applicants' prior Response"), Applicants attempted to distinguish the claimed invention from the cited references by arguing that the references disclose the performance of tests by a "recipient subsystem" independent of a "clinician subsystem." (*See*, Applicant's prior Response, pgs. 10-13). Applicants respectfully withdraw this statement. Applicants respectfully assert that in certain embodiments of the present invention the "recipient subsystem" operates independently of the "clinician subsystem," while in other embodiments the "recipient subsystem" operates substantially independent of the "clinician subsystem."

33. Applicants assert that, in contrast to Applicants' remarks made in the Response filed March 24, 2009, in which Applicant stated that the claimed recipient subsystem operates

independent of the clinician subsystem, the recipient subsystem of the present invention operates substantially independent of the “clinician subsystem.” Applicant submits that if the Examiner has examined the application in light of the above statement, further examination may be required. *See Rohm & Haas Co., v. Crystal Chemical Co.*, 722 F.2d 1556, 1572 (Fed. Cir. 1983).

Conclusion

34. In view of the foregoing, this application should be in condition for allowance. A notice to this effect is respectfully requested.

35. Applicants make no admissions by not addressing any outstanding rejections or basis of rejections. Furthermore, Applicants reserve the right to pursue any cancelled claims or other subject matter disclosed in this application in a continuation or divisional application. Thus, cancellations and amendments of above claims, are not to be construed as an admission regarding the patentability of any claims.

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